



7th September 2023

Subject: Appeal FAC002/2023 against licence decision CN90200

Dear

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and Marine (Minister). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC002/2023 was held remotely by the FAC on 31st August 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Vincent Upton
Secretary to the FAC: Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to refuse the licence CN90200. The reasons for this decision are set out hereunder.

Background

The decision under appeal relates to an application for an afforestation licence on 4.13 hectares at Ross beg, Co. Leitrim. The FAC was directed to the DAFMs Forestry Licence Viewer as being the source of documents related to the appeal and the FAC relied on these documents and the submissions made by the parties in considering the appeal.

The land is described as enclosed agricultural land on mineral soil and with a grass, grass rush vegetation type. The application was for the establishment of a native woodland comprised of pedunculate oak, downy birch, common alder and other broadleaf species. Ground preparation would be through woody weed removal, mounding and pit planting without additional drainage or fertiliser use. Weed control would be through manual methods and herbicide use in years 0-3. Road access is submitted to be provided and maps show the land adjoins a minor public road. The application includes 640 metres of

stock fencing. The application included a number of maps including location map on Ordnance Survey mapping, a fencing map on an aerial image and a biomap with a number of environmental features marked. The biomap marks the public road to the west and a river to the east, hedgerows and silt traps. The application includes setbacks from the river to the east and public road to the west. The application included a number of environmental considerations and notes the location with reference to the Leitrim CDP and Lough Rinn. The application also states that all hedgerows and existing trees would be retained. The documents include a copy of a site notice and a photograph of an erected site notice and the location of the site notice is marked on the biomap.

The Application was referred to two prescribed bodies, Leitrim County Council and An Taisce. The County Council submitted a number of conditions listed in an Engineers Report and that there was no objection subject to liaising with the Engineer prior to the commencement of works and adherence with the Environmental Requirements for Afforestation. An Taisce responded raising concerns about the aquatic setback and submitted that there are general records of otter and badger in the area.

The application was open to public consultation and two submissions were made. This was from an individual who submitted that they owned land adjacent to the application area. The submission states that the area is a bird conservation area and that Bird Watch Ireland are carrying out duties on the adjoining lands. It is submitted that there are at least two nesting pairs of Curlew in the area in recent years and that it is essential to keep prey and vermin under control. It is submitted that the afforestation would harbour "vermin and prey" like fox, pine martin and mink and would be detrimental to the safe environment. The submitter also states that they own land adjoining the site and that the proposal would overshadow their land and devalue their property. A second submission is on file from a CLG which raises concerns regarding impacts of afforestation on the local population, competition with farmers and the requirements of the EU EIA, Birds and Habitats Directives.

The DAFM wrote to the Applicant on 7th July 2022 with a Request for Supporting Documentation. This states that the application is within 1km of a current Curlew nesting site and requires the submission of a report, informed by a survey, by a suitably qualified and experienced ornithologist to address a number of stated matters.

The documents include an Ecology Report dated 18th November 2022 prepared by a Forest Service Ecologist. This report states that the site is not within a designated area but is within a Curlew Current Breeding Sites plus 1km Buffer and in close proximity to a number of other Curlew Current Breeding Sites plus 1km Buffer. Reference is made to a policy of referral of such applications to the Head of Ecology and that refusal will be recommended without further ecological assessment where it is determined that the application is likely to adversely affect the conservation of Curlew with reference to Forest Service policy of 6th October 2022.

The documents include files entitled an Inspectors Certification Report and an Assessment for EIA Requirement both of which appear incomplete.

The licence application was refused on 25th January 2023 and the refusal letters states,

I regret to inform you that the Forest Service cannot approve this application for the following reasons:

- Environmental Considerations,

- CN90200 is within a Curlew Current Breeding Sites plus 1km Buffer and in close proximity to a number of other Curlew Current Breeding Sites plus 1km Buffer. It has the potential to adversely impact the species as outlined above and it is not possible to mitigate the impact. Therefore, given the current species status, refusal is recommended. This refusal is to ensure good forestry practice, the protection of the environment, health and public safety. This refusal is issued under the Forestry Regulations 2017 (S.I No. 191 of 2017). You are now required to remove your site notice immediately.

Appeal

There is one first party appeal against the refusal and the full grounds of appeal, responding statement and submissions were provided to the parties. In summary the grounds submit that the assertions contained in the DAFM Ecology report are incorrect and that there is no evidence that their Native woodland would threaten Curlews. It is submitted that proper procedure was not followed in the assessment of the application and that the DAFM has not provided the policy guiding the refusal nor allowed access to the dataset and that it is impossible to comply with or make an appeal against an invisible policy. It is submitted that a Curlew conservation policy is likely to be amended or discontinued and that any refusal should be tied to the policy so that a licence can be automatically allowed if the policy is amended.

The grounds submit that the application is seeking to return this land to its natural state, which is Northern Temperate Rainforest, which will not be used directly by Curlew but that Curlews will continue to live on the many nearby bogs, which are also part of the natural state of this part of Leitrim. It is submitted that the establishment of new Native woodland in Ireland is part of National, European, and UN biodiversity policy and the refusal is a violation of these policies and will significantly discourage future applicants.

The grounds refer to the following documents as forming part of the submission, *The Status of EU Protected Habitats and Species in Ireland – Habitat Assessment – Volume 2 2019* (Department of Culture, Heritage and the Gaeltacht), *Woodland for Water: Creating new native woodlands to protect and enhance Ireland's waters* (Department of agriculture, Food and the Marine, and a document prepared by the Appellant on the IUCN Status of Irish Birds. The latter document describes the Appellant's search of IUCN databases and they submit that the IUCN describes the species as near threatened and that the description of the species as threatened is false. The document describes the assigned status of a number of other Irish bird species and submits that a number of species are at greater risk than the Curlew.

Minister's Statement

The DAFM submitted a statement in response to the appeal which described the processing of the application and addressed the grounds of appeal. This submits that the decision was made in accordance with DAFM procedures, SI 191 of 2017 and the 2014 Forestry Act and that the licence was refused on the basis of the recommendations contained with the ecology report.

A separate response on ecology issues was also prepared. This submits that the reference to the Curlew being the only Irish bird on the IUCN Red List of Threatened Species was taken from the Curlew Task Force document and does not state which of the 10 categories the species has been assigned. However, it is accepted that there are a number of other bird species that are also threatened but that those species have not generally been identified as being impacted by afforestation. It is submitted that forestry and agricultural intensification have been identified as threats to the species.

The submission also refers to the NPWS *Curlew Conservation Programme Annual Report 2022* (Servignat and O'Donoghue 2022) and a suggested recommendation that large-scale habitat remediation and improvement works were needed. It was submitted that the need to provide for undisturbed nesting and chick rearing habitat for farmland waders is recognised in ACRES (the FAC understands this to be the Agri-Climate Rural Environment Scheme of the DAFM). It was submitted that afforestation can be associated with both direct and indirect effects related to habitat loss and fragmentation and increased vulnerability to predators and perception of predator risk. Reference was made to recommendations in the Curlew Task Force document.

The DAFM statement provides further information on population data for the Curlew and other species and re-iterates the proximity of the proposal to current breeding sites of Curlew.

The DAFM also submitted a document entitled *Action for Curlew in Ireland Recommendations of The Curlew Task Force* (May 2019), Task Force document. This document outlines the recommendations of an advisory group formed by the Minister for Culture, Heritage and the Gaeltacht and included a range of stakeholders including the DAFM. The recommendations are grouped into sub-group and include recommendations related to forestry. The Forest chapter includes a description of what are described as Forest Service procedures where an application falls within a 1km buffer of a Curlew nest or 250 metres of a former nesting site.

The DAFM also submitted a list of threatened bird species prepared by Bird Watch Ireland and the British Society for the Protection of birds and the associated journal article (Gilbert et al., 2021). The Article includes an Ireland level status for a range of species based on specified criteria. The Curlew is assigned a Red status in this publication. The publication also notes that the IUCN describe red listed species as those that are Globally Threatened (Critically Endangered, Endangered or Vulnerable, but not Near Threatened).

Further Submissions

The Appellant submitted an email to the FAC on 5th March 2023 which including a response from an unidentified ornithologist briefly outlining a possible survey and report. The Appellant emailed the FAC on 13th April 2023 outlining that they required further information to facilitate a report by their Ornithologist.

The Appellant made a further submission on 19th July 2023 elaborating their grounds of appeal. The submission outlined how the Appellant had purchased the land for the purpose of planting native woodland and that the use of the land for cattle grazing was discontinued and that when established they hoped to have the land accessible for recreation and educational purposes. It is submitted that during the processing of the application the DAFM had requested an ornithological report but that this request was withdrawn and that the Appellant had understood that there was no further issue until they received the refusal letter. The submission goes on to expand on the grounds of appeal. It was submitted the policy relied on by the DAFM was unknown to the Appellant and that the dataset referred to cannot be accessed. They submit that the reports relied on by the DAFM are speculative and that there is no evidence that native woodland has a deleterious effect. They refer to a study (Renwick et al. 2012) in which it is stated that a positive correlation was identified between broadleaf and mixed forest and curlew populations. The submission challenged the procedure adopted by the DAFM with reference to the rescinding of the request for an ornithological report and the policy postdating the application. It is also submitted that the DAFM had refused to provide policy documents. The submission makes a number of claims regarding the suitability of the lands and landscape in the areas including that cattle have been excluded from the lands and that they will convert to scrub which would present a greater threat. They also submit that a number of the surrounding fields had been ploughed and resown with non-native species recently. The Appellant made a further submission on 23rd August 2023 challenging a number of the DAFM claims, submitting that the application is not likely to impact on curlew based on the general landscape, and that it is highly likely that the if the project does not proceed that the land would be comprised of non-native species, amongst other points.

The DAFM made a further submission on 25th July 2023. This response included an email from the Appellant which had not been provided to the FAC and a Journal article. In this response the DAFM submitted that the request for an ornithological study was withdrawn following an email from the Appellant, that there is evidence linking forest cover and negative impacts on Curlew.

The FAC sought further information from the DAFM in relation to the reference to an Office Note 06/10/2022 and Forest Service policy 06/10/22 in the ecology report. The DAFM replied providing an email that was circulated to DAFM Forestry staff and submitted that there was no record of a Forest Service policy document of 06/10/22. They also submitted what was described as Curlew DAFM Procedures (2018) which corresponded to the description in the Task Force document.

Considerations of the FAC

The FAC considered that the grounds of appeal raised both technical and procedural matters. The Appellant is evidently correct in submitting that the IUCN classifies the Curlew (*Numenius arquata*) as

Near Threatened and not within one of the three threatened categories employed in the Red List. However, the IUCN also note that the population is declining in Europe and the substantial decrease in the breeding population in Ireland and the UK is well documented, including in the documents submitted by the DAFM. The FAC understands that Ireland has general obligations regarding the protection of birds and that the Minister might adopt policies in relation to their designated powers for the protection of species, particularly in agreement with the NPWS, Department of Housing, Local Government and Heritage which the DAFM note is the competent authority for conservation. Under the Forestry Regulations 2017, the Minister is required to refuse an application where it is likely to have a significant adverse impact on nature conservation, although this was not the reason provided in this case.

The DAFM appear to rely on the Task Force document in their statement responding to the appeal. However, there is no indication that these recommendations have been adopted by the Minister as policy. In addition, the FAC is not satisfied that this document can be used as a meaningful basis for the decision. This document primarily identifies habitat loss and fragmentation as a concern in relation to forestry although it also notes the potential for indirect effects to arise, such as predation. There is no claim that the land, which is comprised of improved agricultural pasture on mineral soil, would constitute suitable habitat or that its conversion to woodland would result in habitat fragmentation. The Task Force report also primarily refers to adverse effects of converting upland peatlands and bogs to commercial forestry which does not represent the current application which involves the creation of native woodland on lowland improved pasture on mineral soil. While an extension of the buffer in which a screening might be required is recommended the document does not recommend the complete setting aside of the current policy. It would appear to the FAC that the potential impacts identified in the Task Force document would be considered in a report prepared in keeping with the DAFM Curlew procedures (2018). As noted in the appeal much of the literature that is referred to by the DAFM concerns the conversion of upland peatlands to commercial forestry. The literature also notes the risks associated with trampling and predation by livestock.

One of the recommendations of the Task Force is that applications be reviewed by ornithologists with Curlew expertise and knowledge. The Appellant has submitted that they are willing to engage such an ornithologist and this would include a site visit and survey, something which has not been undertaken by the DAFM in making the decision. While the DAFM make comparisons with their approach to Appropriate Assessment under the Forestry Regulations 2017 and EU Habitats Directive the situation is different in that the Minister has specific legal obligations in relation to Appropriate Assessment and such a report prepared by the DAFM is subject to public consultation during which an applicant is offered an opportunity to respond. In this case the Appellant was initially invited to engage an ornithologist but this opportunity was removed without reason.

The DAFM appear to base the decision solely on the perceived threat of predation and state that this cannot be mitigated but the Task Force document recommends that mitigation be undertaken in relation to predation. Also, as noted by the Appellant the current use of the land is likely sub-optimal for Curlew. The relevant DAFM policy is that in preparing a report an ornithologist would consider predation

and mitigation amongst other matters based on site surveys and in the context of the wider landscape. This has not been undertaken by the DAFM and the Appellant has not been afforded the opportunity to have such a study undertaken. The NPWS report (Servignat and O'Donoghue, 2022) describes the successful use of mitigation and other measures in achieving successful breeding and rearing, although that relates primarily to the nesting sites.

The Appellant submitted some general views that are attributed to an unnamed ornithologist. The FAC can not treat this as any real evidence but it does raise the kind of questions that should be addressed in considering the application. The Appellant submitted an academic paper by Renwick et al. (2012) which does record a positive correlation between surveyed Curlew populations and broadleaf cover in Britain while the correlation is negative in relation to coniferous cover. While this may have some relevance the FAC noted that the paper relies on the first survey records of adult birds early in the season so does not necessarily reflect the issue of successful breeding and rearing. At the same time, as noted in the grounds much of the documents submitted by the DAFM relate to situations that are different from the application at hand. For example, the Hancock et al. (2020) study examines the correlation between coniferous plantations in extensive upland deep peat sites, that would historically have been treeless, and scat counts, used as a proxy for potential predator population. The evidence suggests that in some ways the current appeal may relate to the opposite scenario, the conversion of a manmade landscape to something approaching the likely natural cover of native woodland on mineral soils. The current use of the land already may provide suitable habitat for potential predators and unsuitable habitat for Curlew. This, of course, is the nature of scientific study and policy-making and a balance of evidence is required, which is why an ornithological report would be beneficial. In this case however the DAFM have not provided the policy basis for the decision that was made and have not processed the application in keeping with their published procedures.

As noted by the DAFM, the NPWS is the competent authority for nature conservation and there is an existing agreement to share survey data collected by the NPWS with the DAFM to facilitate the DAFM policy as outlined in the Task Force document and the Curlew DAFM Procedures 2018 document provided to the FAC. There is no real evidence that a formal change in the Minister's policy has occurred or that the NPWS have been consulted in any meaningful way on any such change. While the DAFM could clearly change its policy it would be expected that such a change would take place in consultation with the NPWS and the reasons for such a change would be clearly outlined. Furthermore, it is generally expected that an administrative authority acts in compliance with fair procedures in undertaking its function. The Appellant submitted that they sought the policy under which the decision was made and this was not provided. The FAC also sought the policy document referred to in the report and the DAFM could not provide this document. In relation to the specific decision under appeal, the application was referred to the County Council and An Taisce but not to the NPWS.

From a procedural perspective the FAC considers that the DAFM did not implement the policy as stated at the time the decision was made which would allow an Applicant the opportunity to engage a suitably qualified Ornithologist to undertake a survey to address a number of stated concerns. As noted in the appeal this opportunity was actually removed after having been provided with no reason and with no

further contact until the refusal letter was received. The FAC is satisfied that this represents a serious error.

The Appellant also submitted that an application should be tied to a policy, such as that for Curlew, so that it might be granted where the policy changes. The FAC does not consider this to be reasonable as it would require applications to be held indefinitely and reassessed on a regular basis. The FAC does not consider that there is any real basis for such a procedure but an applicant that was refused a licence might make a new application in light of a policy change. The Appellant also submitted that it is Government policy to encourage the planting of native woodland and that a refusal might discourage future applications. This has not been challenged by the Minister, nor have they suggested that the proposal would not have biodiversity benefits. The FAC considers that the benefits of afforestation are clearly identified in forest and climate change policies in Ireland. However, the licencing process must operate in keeping with policies, procedures and legislation even where refusals might dissuade future applications.

For clarity, the FAC is not satisfied that an afforestation licence should be granted or not in this case. Even where the matters related to Curlew might be satisfactorily addressed, and there is no guarantee that this would be the case, the Minister would still need to complete the full processing of the application, including the necessary screenings and assessments under EU Directives, and reach a final decision. However, the Appellant should be offered the opportunity to engage a suitably qualified ornithologist to prepare a report in keeping with the DAFM policy and the DAFM should consider any such submission. The Appellant may decide not to pursue such a survey. In addition, the DAFM may still determine that a significant adverse impact on nature conservation is likely to occur or reach another conclusion that might result in refusal, however the reasons for any decision must be provided.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a series of serious and significant errors was made in the making of the decision in this case. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence CN90200 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to provide the Appellant with an opportunity to engage a suitably qualified ornithologist to produce a report addressing the matters outlined in the Curlew DAFM Procedures (2018) and to consider any such report in making a new decision.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee